

Service Date: January 24, 2014

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Application of) REGULATORY DIVISION
NorthWestern Energy for Hydro Assets) DOCKET NO. D2013.12.85
Purchase) ORDER NO. 7323c

PROTECTIVE ORDER

PROCEDURAL HISTORY

1. On December 20, 2013, NorthWestern Corporation doing business as NorthWestern Energy (NorthWestern) filed its *Application for Hydro Assets Purchase* (Application) with the Montana Public Service Commission (Commission). The Commission issued a *Notice of Application and Intervention Deadline and Initial Procedural Schedule* on December 23, 2013.

2. On December 27, 2013, the Commission issued Data Request PSC-001, which asked NorthWestern to provide the Confidential Information Memorandum (CIM) of PPL Montana, LLC (PPLM) referred to in testimony attached to the Application. The CIM contains certain projections made by PPL EnergyPlus, LLC (PPL EnergyPlus), an affiliate of PPLM.

3. On January 10, 2014, NorthWestern filed a *Motion for Protective Order of Confidential Projections and Brief in Support* (Motion), as well as the *Affidavit of Joel D. Cook*. Based on a description of the information provided by NorthWestern, the Commission published notice of the Motion in its weekly agenda on January 9, 2014.

FINDINGS OF FACT

4. In its Motion, NorthWestern seeks to protect the following information (PPL Projections):

Confidential estimates and projected information in Figure 29, page 52 of the CIM that include details about PPL EnergyPlus' projected, future incremental prices and revenue, such as average peak prices for and streams of revenue from existing

wholesale and retail contracts that NorthWestern will not be acquiring as part of NorthWestern's agreement to purchase the hydroelectric facilities of PPLM.

Mot. p. 3 (Jan. 10, 2014). More specifically:

this information provides significant insights about: future average estimated prices that PPL EnergyPlus expects for the next five years; indications to competitors and customers about PPL EnergyPlus' future financial position, relative financial strength or weakness, and the amount of hedging activity undertaken by PPL EnergyPlus; a picture of the amount of volume remaining available for sale by PPL EnergyPlus in future years and the volumes already committed to sale; the relative portions of PPL EnergyPlus' supplies committed to wholesale versus retail sales in future years; estimates of PPL EnergyPlus' future wholesale and retail pricing strategies for wholesale and retail sales; and estimates of future retail and wholesale prices actually agreed to by PPL EnergyPlus in past periods.

Aff. Joel D. Cook ¶ 9 (Jan. 10, 2014).

5. NorthWestern has considered that the Commission is a public agency and that there is a presumption of access to documents and information in the Commission's possession.

Mot. at p. 2.

6. The PPL Projections consist of observations, data and facts. *Id.* at p. 4.

7. According to Joel D. Cook, the Vice President of Retail Marketing and Western Trading of PPL EnergyPlus, the PPL Projections were "compiled strictly for the CIM," are secret and not publicly available:

PPL EnergyPlus engages in extensive efforts to protect the confidentiality of information like that contained in Figure 29 of the CIM. Our wholesale and retail customers generally require PPL EnergyPlus to keep this type of specific contract information confidential. Also, under the Information Security policies of PPL Corporation and PPL EnergyPlus, PPL employees are required to keep this type of information secure, both physically and electronically, and accessible only to employees with the appropriate need to know such information. PPL Montana obtained this information from PPL EnergyPlus and revealed this information to its advisers and to NorthWestern on the condition that such advisers and NorthWestern had entered into confidentiality agreements whereby they had agreed not to disclose this type of information.

Aff. Cook at ¶¶ 6-7. According to Mr. Cook, "No public documents exist which could reveal this information by any means," and "no one could reasonably ascertain this information by accessing any publicly available information." *Id.* at ¶ 8.

8. NorthWestern and PPL EnergyPlus assert that disclosure of the PPL Projections would "lessen competition in the market to the detriment of wholesale power customers and the

retail customers they serve.” *Id.* at ¶ 9; Mot. at p. 5. Public release of the PPL Projections would “produce significant financial harm to PPL EnergyPlus” by:

decreasing future margins and revenues; potentially causing the increase of collateral or other credit that may be required by future counterparties; generally placing PPL EnergyPlus at an information disadvantage as compared to the competitors and customers it does business with and competes with every day; and harming the ability of PPL EnergyPlus to negotiate favorably with potential counterparties in future periods.

Aff. Cook at ¶ 10; Mot. at p. 7.

CONCLUSIONS OF LAW

9. The Montana Constitution imposes “an ‘affirmative’ duty on government officials to make all of their records and proceedings available to public scrutiny.” *Great Falls Tribune v. Mont. Pub. Serv. Commn.*, 2003 MT 359, ¶ 54, 319 Mont. 38. However, “a trade secret is one form of information in which there is a statutorily defined property right.” *Id.* at ¶ 59. As a result, the Commission “may issue a protective order when necessary to preserve trade secrets . . . as required to carry out its regulatory functions.” Mont. Code Ann. § 69-3-105(2) (2013).

10. An entity seeking a protective order “must support its claim of confidentiality by filing a supporting affidavit making a *prima facie* showing that the materials constitute property rights which are protected under constitutional due process requirements.” *Great Falls Tribune*, ¶ 56. “The claimant’s showing must be more than conclusory” and “must make clear . . . the basis for the request.” *Id.*; Admin. R. Mont. 38.5.5007(3) (2014).

11. In order to claim a trade secret as the basis for a protective order, a claimant must demonstrate that: (1) It has considered the Commission is a public agency and that there is a Constitutional presumption of access to documents and information in the Commission’s possession; (2) the claimed trade secret material is information; (3) the information is secret; (4) the secret information is subject to efforts reasonable under the circumstances to maintain its secrecy; (5) the secret information is not readily ascertainable by proper means; and (6) the information derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy. Admin. R. Mont. 38.2.5007(4)(b); *see also* 38.2.5001(3) (defining “information” as “knowledge, observations, opinions, data, facts, and the like.”).

12. The Commission previously protected forward-looking financial projections as trade secrets. *See* Or. 7046c, Dkt. D2009.9.129 (Mar. 9, 2010) (protecting revenue projections).

13. NorthWestern has demonstrated the PPL Projections are secret information that is not readily ascertainable by proper means, is subject to reasonable efforts to maintain its secrecy, and derives independent economic value from its secrecy. *Supra* ¶¶ 6-8. NorthWestern has therefore made a *prima facie* showing that the PPL Projections are trade secrets entitled to protection under constitutional due process requirements.

ORDER

IT IS HEREBY ORDERED THAT:

14. NorthWestern's *Motion for Protective Order* is GRANTED;
15. Information submitted in accordance with this Order be treated as confidential pursuant to Title 38, Subchapter 50 of the Administrative Rules of Montana; and
16. NorthWestern file the PPL Projections in accordance with this Order by January 27, 2014.

DONE AND DATED this 23rd day of January, 2014 by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

W. A. GALLAGHER, Chairman

BOB LAKE, Vice Chairman

KIRK BUSHMAN, Commissioner

TRAVIS KAVULLA, Commissioner

ROGER KOOPMAN, Commissioner

ATTEST:

Aleisha Solem
Commission Secretary

(SEAL)

Protective Orders and Protection of Confidential Information

Nondisclosure Agreement

(7-26-00)

ARM 38.2.5012

Docket No. D2013.12.85, Order No. 7323c

Order Action Date: January 23, 2014

I understand that in my capacity as counsel or expert witness for a party to this proceeding before the commission, or as a person otherwise lawfully so entitled, I may be called upon to access, review, and analyze information which is protected as confidential information. I have reviewed ARM 38.2.5001 through 38.2.5030 (commission rules applicable to protection of confidential information) and protective orders governing the protected information that I am entitled to receive. I fully understand, and agree to comply with and be bound by, the terms and conditions thereof. I will neither use nor disclose confidential information except for lawful purposes in accordance with the governing protective order and ARM 38.2.5001 through 38.2.5030 so long as such information remains protected.

I understand that this nondisclosure agreement may be copied and distributed to any person having an interest in it and that it may be retained at the offices of the provider, commission, consumer counsel, any party and may be further and freely distributed.

Typed or Printed Name

Signature

Date of Signature

Business Address:

Employer

Party Represented